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Spyware Legislation Update

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Spyware Legislation Update

- Summary and Background
- Federal Legislation
- State Legislation

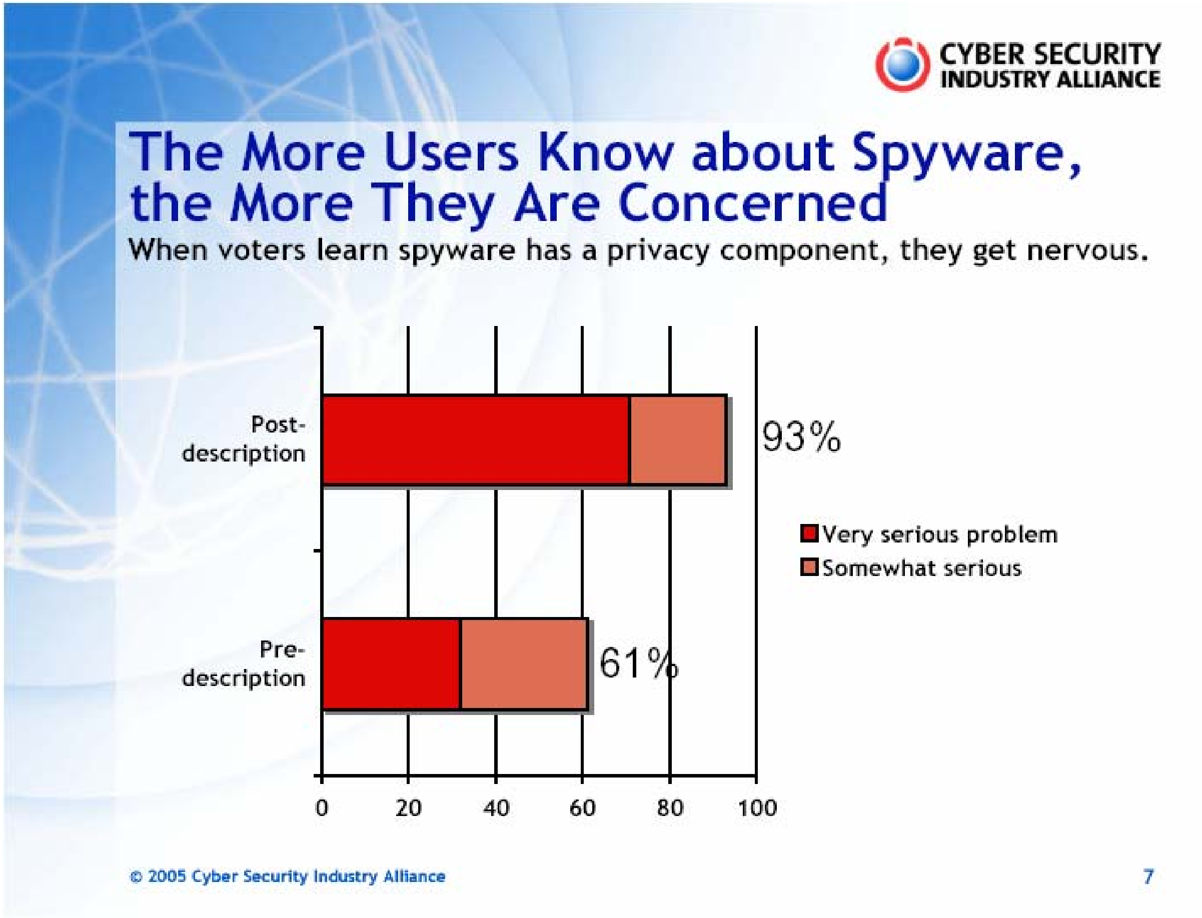
Spyware Legislation Update

Legislation Summary

- **Federal** -- Three bills
  - **HR 29 -- The Securely Protect Yourself Against Cyber Trespass Act, or SPY ACT** (Bono)
  - **HR 744 -- Internet Spyware (I-SPY) Prevention Act of 2005** (Goodlatte)
  - **S 687 -- Software Principles Yielding Better Levels of Consumer Knowledge Act or the SPY BLOCK Act** (Burns)
- **State**
  - **Four existing anti-spyware laws**
    - **Utah, Washington, Virginia and California**
  - **Over twenty states have anti-spyware bills pending**

Spyware Legislation Update

Legislation Summary -- Do we need anti-spyware laws?



CYBER SECURITY INDUSTRY ALLIANCE

The More Users Know about Spyware, the More They Are Concerned

When voters learn spyware has a privacy component, they get nervous.

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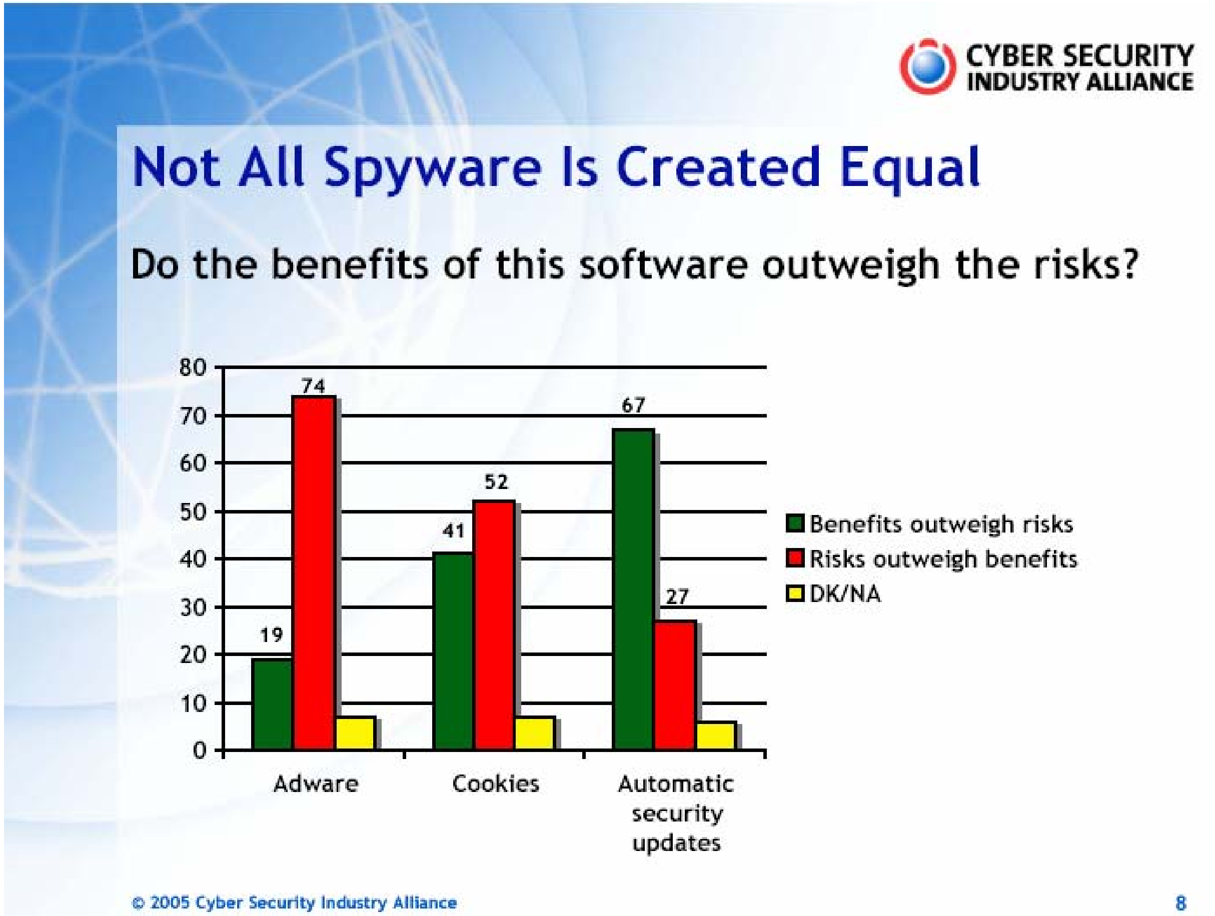
Spyware Legislation Update

Legislation Summary -- Do we need anti-spyware laws?



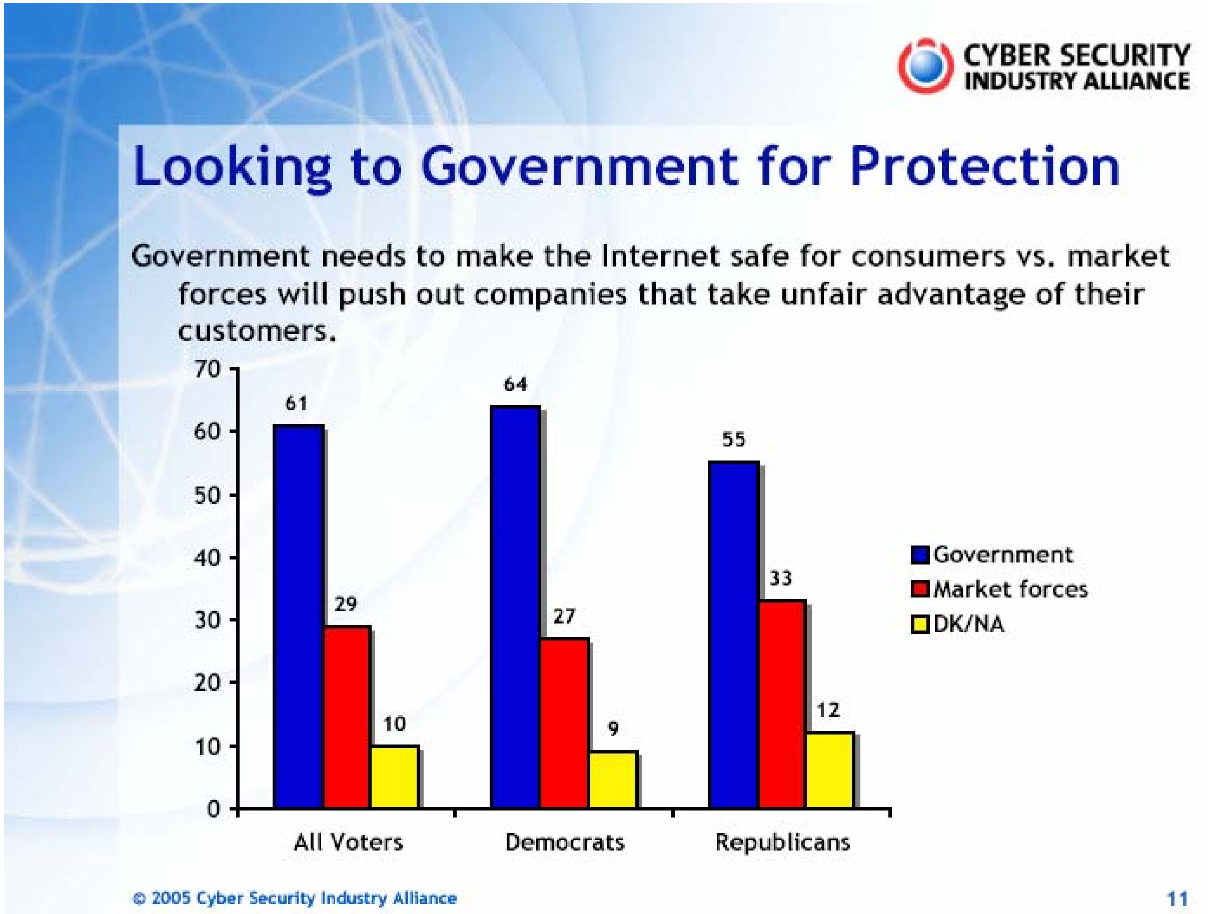
CYBER SECURITY INDUSTRY ALLIANCE

Not All Spyware Is Created Equal

Do the benefits of this software outweigh the risks?

Spyware Legislation Update

Legislation Summary -- Do we need anti-spyware laws?



CYBER SECURITY INDUSTRY ALLIANCE

Looking to Government for Protection

Government needs to make the Internet safe for consumers vs. market forces will push out companies that take unfair advantage of their customers.

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Spyware Legislation Update

Legislation Summary

- In general, existing and proposed legislation attempts to prohibit **"deceptive" practices involving the *unauthorized* installation of programs that monitor a consumer's activities *without their consent*.**
  - Working definition of Spyware?
- As a result, these statutes tend to prohibit both the transmission or installation "through intentionally deceptive means" of software that either changes configurations of certain programs, or collects personally identifiable information, or prevents a user's efforts to block installation, or falsely claims that software will be disabled by the user's actions, or removes or disables security software, or takes control of the computer.
  - If a user *wants* to install software that does all these things, the law would assumedly not prohibit these things.
- Variously, existing and proposed laws invoke criminal penalties, statutory damages, private rights of action, and also empower regulators to promulgate rules and oversee enforcement .

Spyware Legislation Update

Legislation Summary – Towards an Analytical Framework

- **The *unauthorized* installation of programs that monitor a consumer's activities *without their consent*.**
  - (1) (Un)authorized installation?;
    - Did the user authorize the installation?
  - (2) Without **consent** as to what the program does?
    - Did the user have sufficient **notice** of what the program does so as to constitute consent?
  - The two questions are related in several respects.
    - User would probably not authorize installation of spyware if given sufficient notice of what the programs do and knowledge that uninstalling these types of programs typically proves quite difficult.

Spyware Legislation Update

Key Legislative Issues – Notice and Consent – Current Practices

- "Notice and proceed" consent
  - Usually achieved through some form of advisory on a webpage, providing users with access to Terms of Service or Terms of Use (accessible through a link on a home page) or providing the relatively easy ability to download or view a Software License Agreement (see "Precision Time" example).
- "Clickwrap" consent
  - Usually achieved by some form of click-through agreement, again, by providing users with the relatively easy ability to download or view a Software License Agreement.
- Both usually will suffice to bind the consumer to any non-egregious or unconscionable terms of a contract, including binding arbitration and choice of venue in the website operator's home jurisdiction (Guam? Northern Marianas Islands?).
- Is a higher standard for consent needed based on the purpose of the software? Should the user have to affirmatively consent (opt-out)?

Spyware Legislation Update

Key Legislative Issues – Notice and Consent

- Just how "prominent" must a Software License Agreement or website be in order to not constitute a "deceptive" practice?
- How detailed must a software distributor be in describing exactly what registry settings the software alters, what information it collects, and what programs it may interfere with in order to avoid liability? How does a software distributor get consent of, for example, a 13-year-old who just wants to download a screensaver, yet is below the age to legally enter into a contract? Or what about a 92-year-old first time computer user who is installing a program he or she read about in a magazine?

Spyware Legislation Update

Key Legislative Issues – Notice and Consent

- By simply downloading and installing typical peer-to-peer (P2P) network software and adware-type products, the user agrees to the terms of 5,000-word+ license agreements, which attempt to distinguish between the malicious "spyware" that they would *never* install on your computer, and the helpful and friendly "adware" which delivers ads to users “based on computer usage and some of their web surfing behavior.”
- Consider a website which might contain language at the bottom (under the "privacy policy" or "legal‟ links) to the effect that, by proceeding past the home page, or by installing certain programs, you are agreeing to the installation of a key logger, password grabber, browser redirector, program crasher, a pop-up installer, and a remote control program. Would liability arise from installation in this context if the uses states that s/he never read or understood what was clearly and plainly written on the website?

Spyware Legislation Update

Federal Legislation Summary

- **HR 29 -- The Securely Protect Yourself Against Cyber Trespass Act, or SPY ACT** (Bono)
  - Makes it 'unlawful for any person who is not the owner or authorized user of a protected computer to engage in deceptive acts or practices.'
  - Passed House 395 to 1; Referred to the Senate Judiciary Committee.
- **HR 744 -- Internet Spyware (I-SPY) Prevention Act of 2005** (Goodlatte)
  - Amends the CFAA to prohibit accessing a protected system via code copied on to the system to, among other things, disseminate personal information.
  - Passed House 393 to 4; Referred to the Senate Committee on Commerce, Science, and Transportation.
- **S 687 -- Software Principles Yielding Better Levels of Consumer Knowledge Act or the SPY BLOCK Act** (Burns)
  - Combines elements of both of the above.
  - Referred to the Committee on Commerce, Science, and Transportation.

Spyware Legislation Update

Federal Legislation – HR 29, SPY ACT (Bono)

- Makes it unlawful for any person who is not the owner or authorized user of a protected computer (a computer exclusively for the use of a financial institution or the U.S. Government, or a computer used in interstate or foreign commerce or communication) to engage in deceptive acts or practices in connection with specified conduct, including:
  - (1) taking unsolicited control of the computer;
  - (2) modifying computer settings;
  - (3) collecting personally identifiable information;
  - (4) inducing the owner or authorized user to disclose personally identifiable information;
  - (5) inducing the unsolicited installation of computer software; and
  - (6) removing or disabling a security, anti-spyware, or anti-virus technology.

Spyware Legislation Update

Federal Legislation – HR 29, SPY ACT (Bono)

- Makes it unlawful for a person to:
  - (1) transmit to a protected computer any information collection program (a program that collects personally identifiable information or information regarding websites accessed and uses the information to send advertising), unless such program provides notice required by this Act before execution of any of the program's collection functions; or
  - (2) execute any collection information program installed on a protected computer unless, *before execution*, the user has consented to such execution under notice requirements of this Act.
  - Provides an exception with respect to Web pages visited within a particular website when the information collected is sent only to the provider of the website accessed.

Spyware Legislation Update

Federal Legislation – HR 29, SPY ACT (Bono)

- Provides for enforcement of violations as unfair or deceptive acts or practices.
- Makes this Act inapplicable with respect to: (1) law enforcement actions; (2) monitoring undertaken for network security; and (3) Good Samaritan actions (actions taken in good faith, and with the user's consent, by a computer software or service provider to remove or disable a program which violates this Act).
- Directs the Federal Trade Commission (FTC) to report to Congress: (1) annually on enforcement actions taken under this Act; and (2) regarding the use of computer tracking cookies in the delivery or display of advertising to computer owners and users.
- Makes this Act: (1) effective 12 months after its enactment; and (2) inapplicable after December 31, 2010.

Spyware Legislation Update

Federal Legislation – HR 29, SPY ACT (Bono) – Notice & Consent

- Clear and conspicuous?
- Clearly distinguishable from other information?
- Statements providing notice and consent?
- Provides for user to grant or deny consent?
- Provides for user to abandon or cancel the transmission or execution of the information collection program without granting or denying such consent?
- Provides option to display, before granting or denying consent, a clear description of: (1) **Types of information** to be collected and sent? (2) **Purpose** for which such information is to be collected and sent?; and(3) **Identity of** any such **software** that is an information collection program.
- Provides for concurrent display of the notice statement, the option grant, deny or cancel, and the clear description (as provided above) until the user: (i) grants or denies consent: (ii) abandons or cancels; or (iii) selects the option for providing a clear description (as described above).

Spyware Legislation Update

Federal Legislation – HR 29, SPY ACT (Bono) – Notice & Consent

- If the product technically adheres to the notice requirement, watch out for “catch-all” enforcement against the installation of software as an unfair or deceptive act or practice.
- Does it constitute a deceptive practice to promote that a product does one thing (provide a screen saver, PC utility, file-sharing capabilities, etc) for “free,” when according to the end user license agreement (EULA), the user “agrees” (by installing the software) to install a variety of other programs that have nothing to do with the bargained-for (and not really “free,” at least according to the agreement) product?
  - Something the user would probably not have agreed to had they read the license agreement.

Spyware Legislation Update

Federal Legislation – HR 744, I-SPY (Goodlatte)

- Amends the Federal criminal code to prohibit intentionally accessing a protected computer without authorization, or exceeding authorized access, by causing a computer program or code to be copied onto the protected computer, and intentionally using that program or code:
  - (1) in furtherance of another Federal criminal offense;
  - (2) to obtain or transmit personal information (including a Social Security number or other government-issued identification number, a bank or credit card number, or an associated password or access code) with intent to defraud or injure a person or cause damage to a protected computer; or
  - (3) to impair the security protection of that computer.

Spyware Legislation Update

Federal Legislation – HR 744, I-SPY (Goodlatte)

- Prohibits any person from bringing a civil action under State law premised upon the defendant's violating this Act.
- Provides that this Act does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency or a U.S. intelligence agency.
- Authorizes appropriations to the Attorney General for prosecutions needed to discourage the use of spyware (i.e., software that aids in gathering and sending information about a person or organization, or in asserting control over their computer, without their knowledge or consent) and the practice called phishing (i.e., using the websites of, or e-mails that appear to be sent from, well known legitimate businesses to deceive Internet users into revealing personal information).
- Expresses the sense of Congress that the Department of Justice should vigorously prosecute those who use spyware to commit crimes and those that conduct phishing scams.

Spyware Legislation Update

Federal Legislation – S 687, SPY BLOCK Act (Burns)

- Makes it unlawful for a person who is not an authorized user of a protected computer (a computer used in interstate or foreign commerce or communication), subject to specified exceptions, to:
  - (1) cause the installation of software on the computer in a manner that conceals the fact of installation from the user or prevents the user from knowingly granting or withholding consent;
  - (2) induce an authorized user to consent to installation through materially false or misleading representations;
  - (3) cause the installation of software that cannot be uninstalled or disabled by an authorized user through usual program removal functions;
  - (4) cause the installation of software that includes a surreptitious information collection feature or use such software to collect information;
  - (5) cause the installation of *adware* without a means of identifying the software source of each advertisement delivered; or
  - (6) engage in other specified unfair or deceptive acts or practices that thwart user control.

Spyware Legislation Update

Federal Legislation – S 687, SPY BLOCK Act (Burns)

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Spyware Legislation Update

Federal Legislation – S 687, SPY BLOCK Act (Burns) – Notice & Consent

- Prevents installation of software in manner that:
  - Conceals that software is being installed; or
  - Prevents the user from having an opportunity to knowingly grant or withhold consent
- Prohibits attaining consent through ***materially false or misleading representations***.
- Prohibits installation of information collection features that transmit information not related to the function or service the that user has ***knowingly*** executed,
  - such that a reasonable user with full knowledge would not likely view the information collection as incidental or in support of the program.
    - Objective or subjective standard?
- Permits enforcement by the FTC for unfair and deceptive practices

Spyware Legislation Update

State Legislation – California – Notice & Consent

- Section 22947.3 (c) prohibits preventing the user's reasonable efforts to block the installation of, or to disable, software, by doing any of the following:
  - (1) Presenting the authorized user with an option to decline installation of software with knowledge that, when the option is selected by the authorized user, the installation nevertheless proceeds.
  - (2) Falsely representing that software has been disabled.
- If the Bono bill becomes law (which insiders increasing predict it will), California’s current anti-Spyware law would actually become one of the few consumer protection laws in the State seemingly weaker than the Federal law.
  - Unlike the Bono bill, the CA provision does not require options for the user to display *any* description of what the software does.

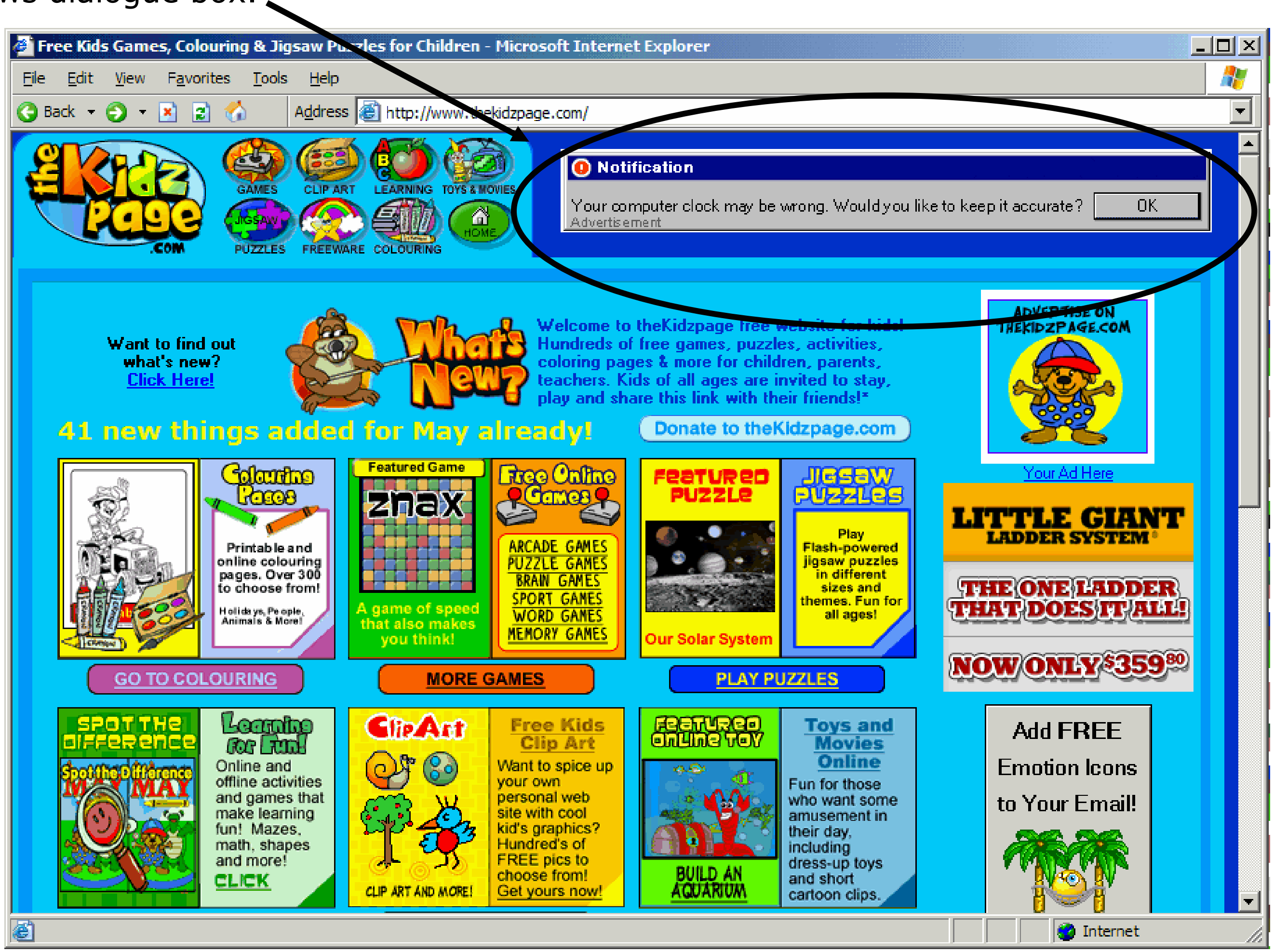
Spyware Legislation Update

Potential Unintended Consequences of Anti-Spyware Legislation

- Enforceability of EULAs generally
  - Certain aspects of consumer software proceed on the assumption that consumers do not read EULAs.
  - The extent to which legislation reinforces or resists this assumption has ramifications for enforcing certain IP rights.
    - Copyright – License or Sale?; Other provisions.
- Anti-Spyware programs
  - Consumers often run anti-spyware programs to remove software which they otherwise “agreed” to install.
  - Software vendors battle with anti-spyware companies.
- Use of Spyware in Industrial Espionage and Litigation
  - Wiretap laws only apply to messages intercepted in transit over wires.
  - Keyloggers and other snooping devices intercept at the source and then transmit over wires.
    - Current Spyware legislation explicitly prohibits the installation of keyloggers.

Spyware Legislation Update

"Precision Time" Example -- Notice and Consent Mechanism: The banner ad below looks like a Windows dialogue box.



Free Kids Games, Colouring & Jigsaw Puzzles for Children - Microsoft Internet Explorer

Address http://www.thekidzpage.com/

Notification

Your computer clock may be wrong. Would you like to keep it accurate? OK

Advertisement

Want to find out what's new? Click Here!

Welcome to theKidzpage free website for kids! Hundreds of free games, puzzles, activities, coloring pages & more for children, parents, teachers. Kids of all ages are invited to stay, play and share this link with their friends!*

41 new things added for May already!

Donate to theKidzpage.com

Printable and online colouring pages. Over 300 to choose from! Holidays, People, Animals & More!

A game of speed that also makes you think!

Play Flash-powered jigsaw puzzles in different sizes and themes. Fun for all ages!

Online and offline activities and games that make learning fun! Mazes, math, shapes and more! CLICK

Want to spice up your own personal web site with cool kid's graphics? Hundred's of FREE pics to choose from! Get yours now!

Fun for those who want some amusement in their day, including dress-up toys and short cartoon clips.

ADVERTISE ON THEKIDZPAGE.COM

Your Ad Here

LITTLE GIANT LADDER SYSTEM

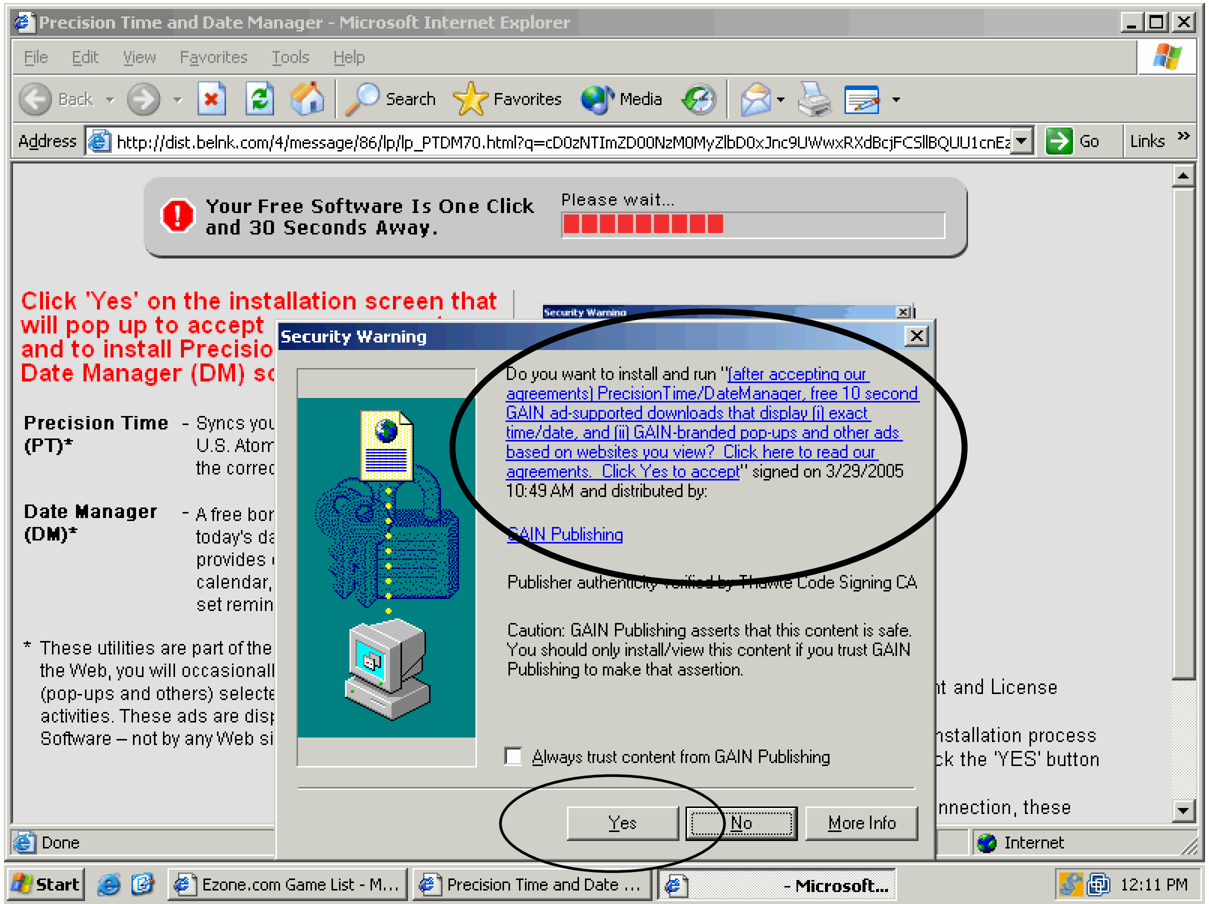
THE ONE LADDER THAT DOES IT ALL!

NOW ONLY $359.80

Add FREE Emotion Icons to Your Email!

Spyware Legislation Update

“Precision Time” Example -- Notice and Consent Mechanism: Clicking anywhere on the banner ad brings this on-screen display. Pressing “Yes” once causes the installation of tracking software without first requiring consent to the terms of the license agreement.



Precision Time and Date Manager - Microsoft Internet Explorer
File Edit View Favorites Tools Help
Back
Search
Favorites
Media
Address
Go
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Ezone.com Game List - M...
Precision Time and Date ...
- Microsoft...
12:11 PM
Yes
No
More Info

http://dist.belnk.com/4/message/86/lp/lp_PTDM70.html?q=cD0zNTImZD00NzM0MyZlbD0xJnc9UWwxRXdBcjFCSllBQUU1cnEz

Your Free Software Is One Click and 30 Seconds Away.

Please wait...

Click 'Yes' on the installation screen that will pop up to accept and to install Precisio Date Manager (DM) sc

Precision Time (PT)* - Syncs you U.S. Atom the correc

Date Manager (DM)* - A free bor today's da provides calendar, set remin

* These utilities are part of the the Web, you will occasionall (pop-ups and others) selecte activities. These ads are disp Software – not by any Web si

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Security Warning

Do you want to install and run "[after accepting our agreements] PrecisionTime/DateManager, free 10 second GAIN ad-supported downloads that display (i) exact time/date, and (ii) GAIN-branded pop-ups and other ads based on websites you view? Click here to read our agreements. Click Yes to accept" signed on 3/29/2005 10:49 AM and distributed by:

GAIN Publishing

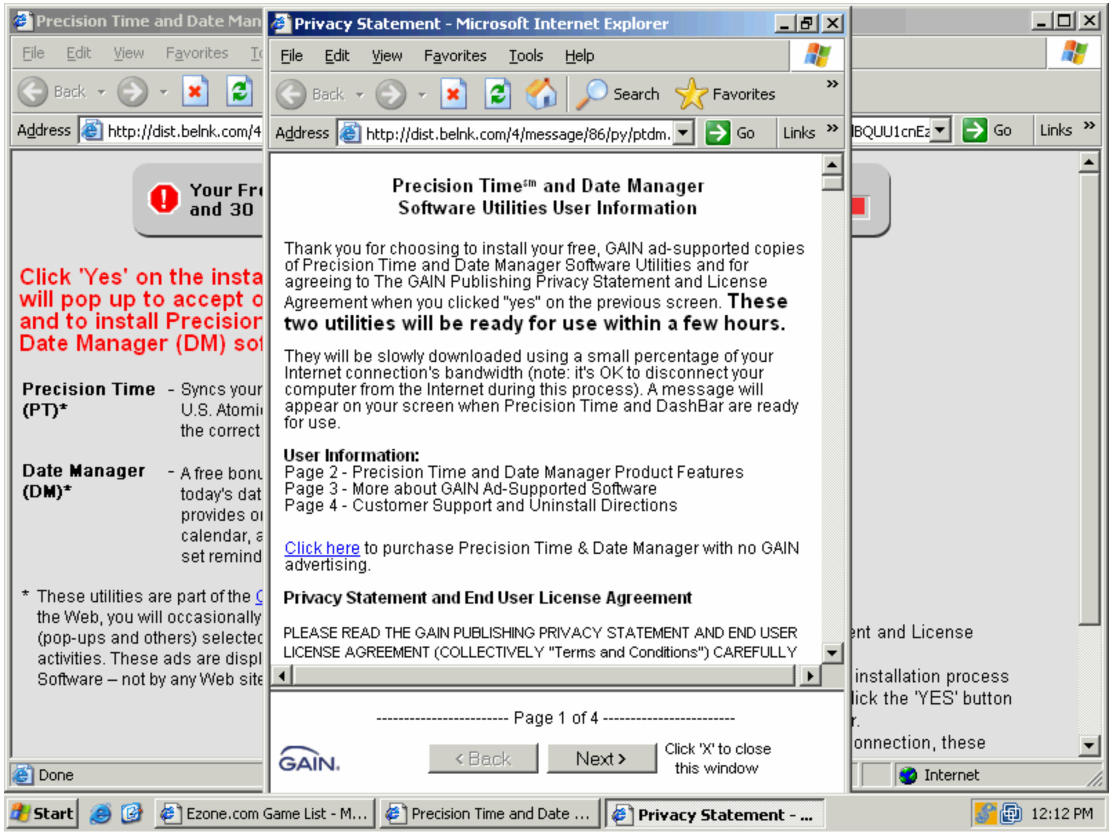
Publisher authenticity verified by Thawte Code Signing CA

Caution: GAIN Publishing asserts that this content is safe. You should only install/view this content if you trust GAIN Publishing to make that assertion.

□ Always trust content from GAIN Publishing

Spyware Legislation Update

“Precision Time” Example -- Terms of contract: If a user clicks “Yes” in the prior screen, this on-screen display appears, showing the first section of a license agreement, after the program installation has already occurred. Note the length of the license (as reflected by the small size of the scroll bar nub at the top of the license window, just right of center).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Privacy Statement - ...
12:12 PM

Precision Time℠ and Date Manager
Software Utilities User Information

Thank you for choosing to install your free, GAIN ad-supported copies of Precision Time and Date Manager Software Utilities and for agreeing to The GAIN Publishing Privacy Statement and License Agreement when you clicked "yes" on the previous screen. **These two utilities will be ready for use within a few hours.**

They will be slowly downloaded using a small percentage of your Internet connection's bandwidth (note: it's OK to disconnect your computer from the Internet during this process). A message will appear on your screen when Precision Time and DashBar are ready for use.

User Information:
Page 2 - Precision Time and Date Manager Product Features
Page 3 - More about GAIN Ad-Supported Software
Page 4 - Customer Support and Uninstall Directions

Click here to purchase Precision Time & Date Manager with no GAIN advertising.

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